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Before The
COPYRIGHT ARBITRATION ROYALTY PANEL
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Distribution of 1990,
1991 and 1992
Cable Royalty Funds

Docket No. 94-3 CARP-CD90-92

**MEMORANDUM OF THE PUBLIC BROADCASTING SERVICE
ON THE LEGAL STANDARDS GOVERNING THIS PROCEEDING**

At the outset of the hearing day on December 11, 1995, the Panel asked all parties to submit briefs on the law and legal standards governing its determination in this proceeding. (Tr. at 1121-25.) On behalf of the Public Television Claimants, PBS hereby submits this memorandum in response to the Panel's request. The memorandum is divided into three parts, to correspond with the three questions raised by the Panel during the December 11 hearing.

A. The Panel's Power

The first question posed by the Panel relates to the nature of its power: "what power does this panel have"? (Tr. at 1121.) The question was also put in these terms: "distinguish between what we must do and what we may do." (Tr. at 1123.) In particular, the Panel asked (Tr. at 1123) for elaboration on the statutory requirement that it "shall act on the basis of" a fully documented written record and prior decisions of the Copyright Royalty Tribunal. 17 U.S.C. § 802(c).

First of all, the statute specifies that the Panel "shall report" its determination to the Librarian within 180 days of the commencement of this proceeding, and that the report "shall be accompanied by the written record" and "shall set forth the facts" that the Panel "found relevant to its determination." 17 U.S.C. § 802(d). While the Panel is not technically an "agency" within the meaning of the Administrative Procedure Act,^{1/} it is clearly contemplated that the Panel should adhere to the general procedures for a formal administrative adjudication on the basis of a written record, as set forth in Section 554 of the APA, 5 U.S.C. § 554.

For instance, the floor statement of Representative Hughes -- the principal architect of the legislation eliminating the CRT in favor of copyright arbitration royalty panels -- says that "the arbitration panels are required to conduct their proceedings according to the Administrative Procedur[e] Act." Cong. Rec. H10973 (Nov. 22, 1993). And the regulations promulgated by the Copyright Office provide that the Panel may issue rulings or orders in accordance with the APA, 5 U.S.C., subchapter II. 37 C.F.R. § 251.50. Thus, the requirement of Section 802 that the Panel "shall act" on the basis of a "fully documented written record" is meant as a shorthand reference to the requirements of a formal

^{1/} See H.R. Rep. 103-286, 103d Cong., 1st Sess., at 13 ("copyright arbitration royalty panels are not agencies within the meaning of the APA").

adjudication conducted on the record in accord with Section 554 of the APA.

A more difficult question is presented by the requirement that the Panel "shall act on the basis of" prior decisions of the CRT. As the Panel noted, that language "doesn't say whether that is to be binding or whether it is persuasive, whether you are just supposed to take those things into account or what." (Tr. at 1123.)

The statutory language reflects the inherent fact that not all questions of the precedential effect of prior CRT decisions can be approached in the same way. For the reasons discussed below, prior factual determinations of the CRT cannot have the same weight as prior legal determinations. Congress did not attempt to resolve such nuances through the general statutory requirement that the Panel "act on the basis of" prior CRT determinations. That language must be interpreted in light of general principles of administrative law dealing with the precedential effect of an agency's prior legal determinations, and judicial decisions that have already addressed the precedential effect to be given prior factual findings of the CRT.

1. Prior Determinations of Law. Over the course of more than a decade of cable royalty distribution proceedings, the CRT rendered various decisions on the governing legal standards applicable to the distribution of cable royalties. Foremost among these was the determination

-- first announced in the 1978 cable royalty distribution proceeding, 45 Fed. Reg. at 63035 (Sept. 23, 1980) -- that royalty distributions would be made according to three primary factors ("the harm caused to copyright owners by secondary transmissions," "the benefit derived by cable systems from . . . secondary transmission[s]," and "marketplace value") and two secondary factors ("quality of copyrighted program material" and "time-related considerations").

These criteria reflected the CRT's legal and policy determination as to the appropriate standards for allocating cable royalties, based on the purpose and legislative history of the Copyright Act. The CRT's intention was to "simulate market valuation." 57 Fed. Reg. at 15288 (Apr. 27, 1992); 51 Fed. Reg. at 12793 (Apr. 15, 1986). The Court of Appeals held that these five factors were "a reasonable interpretation of legislation by the agency charged by Congress with its enforcement." Christian Broadcasting Corp. v. CRT, 720 F.2d 1295, 1313 (D.C. Cir. 1983). It later held that "the Tribunal should rely, as it has in the past, on marketplace criteria" in allocating cable royalties. NAB v. CRT, 772 F.2d 922, 939 (D.C. Cir. 1985).

These criteria were consistently applied by the CRT in every cable distribution proceeding since 1978. E.g., 1983 Cable Distribution Decision, 51 Fed. Reg. at 12793 (Apr. 15, 1986) ("in accordance with past procedure, the Tribunal took evidence based on the criteria established by the Tribunal in

the 1978 cable distribution proceeding").^{2/} Several of the CRT's decisions stated explicitly that these were the criteria "to be applied in . . . subsequent cable royalty distribution proceedings." E.g., 47 Fed. Reg. at 9882 (Mar. 8, 1982); 49 Fed. Reg. at 20049 (May 11, 1984).

The CRT's legal determinations as to the overall standards and decisional criteria applicable to cable royalty distribution proceedings are binding as precedent in this proceeding. This follows from the principles articulated in Atchison, Topeka & Santa Fe Ry. v. Wichita Board of Trade, 412 U.S. 800 (1973): "[A]djudicated cases may and do, of course, serve as vehicles for the formulation of agency policies, which are applied and announced therein. . . . They generally provide a guide to action that the agency may be expected to

^{2/} However, in its 1989 cable royalty distribution determination, the CRT for the first time abandoned the quality criterion, on the basis that it supposedly "conflict[ed] with the First Amendment." 57 Fed. Reg. at 15303 (Apr. 27, 1992). This ruling was in direct conflict with all prior CRT decisions applying quality as a factor in the distribution of cable royalties. Moreover, in the 1978 distribution, the CRT had explicitly rejected the assertion that First Amendment concerns precluded a reliance on quality as a basis for royalty allocations. 45 Fed. Reg. at 63034 (Sept. 23, 1980). And the Court of Appeals had already held that the Tribunal "may use quality of programming as a factor" in allocating royalties. NAB v. CRT, 772 F.2d 922, 939 (D.C. Cir. 1985). The governing precedent on the quality criterion is the many years of CRT decisions accepting it as a basis for royalty distributions, rather than the aberrational 1989 decision that rejected it. The 1989 decision did not supply the sort of "reasoned analysis" on this issue that the Supreme Court has held is required before an agency can reverse a settled and longstanding criterion for its decisionmaking. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983).

take in future cases. Subject to the qualified role of stare decisis in the administrative process, they may serve as precedents. . . . A settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to." Id. at 807 (plurality opinion). Accord, Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29, 41-42 (1983). An agency can only depart from prior legal determinations or norms if it supplies "a reasoned analysis for the change." Id. at 42.^{3/}

Under these standards, the Panel should follow as binding precedent the CRT's prior legal determinations as to the standards and decisional criteria for allocating cable royalties. Other legal determinations -- such as the CRT's ruling that public television programming is "non-network" programming fully eligible for cable royalties, 45 Fed. Reg.

^{3/} See also, e.g., Greyhound Corp. v. ICC, 551 F.2d 414, 416 (D.C. Cir. 1977) ("This court emphatically requires that administrative agencies adhere to their own precedents or explain any deviations from them."). "Thus, if an agency resolves adjudication A in one way by applying a policy or set of decisional criteria, and then resolves adjudication B in a different way by applying a different policy or set of decisional criteria, the second action must be reversed and remanded as arbitrary, capricious and an abuse of discretion unless the agency explicitly acknowledges and explains the reasons for its change in policy." K. Davis, Administrative Law § 17.2, at 104 (1994). An "agency must either follow its own precedents or explain why it departs from them." Id. § 11.5, at 206 (1994).

at 63033 (Sept. 23, 1980) -- must also be accepted as binding precedent. Under the standard enunciated by the Supreme Court in Atchison, Topeka & Santa Fe, these prior legal determinations must form the framework for the decision in this proceeding.^{4/}

2. **Prior Determinations of Fact.** A separate question is presented with respect to the precedential effect to be given prior CRT determinations of fact, or prior CRT applications of its overall decisional criteria to the facts presented on a particular record. Unlike prior legal determinations (which are not dependent on a particular record), these prior factual determinations, made on the basis of prior factual records, cannot be binding as precedent in this case -- since the Panel is obligated by statute to make its decision on the basis of this record, which by definition is different from any record previously presented to the CRT. Prior fact findings of the CRT may be instructive or illustrative of ways that the Panel might evaluate the record evidence in this proceeding -- but treating those prior fact findings as binding or dispositive would be inconsistent with the Panel's obligation to base its ruling on the record presented in this proceeding.

^{4/} Moreover, in the peculiar circumstances of this case, where all parties have developed their cases in reliance on the previously announced legal framework of the CRT's decisions, additional concerns of due process and fundamental fairness would be presented if the Panel were at this stage to depart from that long-established legal framework.

This point applies both to prior subsidiary fact findings and the CRT's ultimate factual determinations as to the appropriate royalty awards to be made to different parties: both the subsidiary and ultimate findings of fact are based on records and evidence different from what the Panel has before it. The Panel must make its factual findings de novo, although there is certainly no prohibition on the Panel's drawing on past CRT factual determinations to the extent those are consistent with the record presented in this proceeding.

The Court of Appeals has already addressed this issue. In NAB v. CRT, 772 F.2d 922, 932 (D.C. Cir. 1985), one issue presented was whether the CRT could properly limit its decision to a "changed circumstances" standard, in which it would take as a given the factual findings of a prior record and the royalty awards made in a prior year, and would simply assess whether circumstances had changed since that year in a manner that justified new awards. The court held that "it would be improper, as a matter of law, for the Tribunal to rely solely upon a standard of 'changed circumstances.'" Id. at 932. "The invalidity of this rigid approach is strongly suggested by our two prior opinions, which expressly contemplate that in the annual determination process the

claimants would improve upon the quality and sophistication of their evidentiary submissions." Id.^{5/}

Thus, the court held squarely that the CRT had to base its fact-findings on the present record rather than being bound by prior factual determinations: "[I]f a claimant presents evidence tending to show that past conclusions were incorrect, the Tribunal should either conclude, after evaluation, that the new evidence is unpersuasive or, if the evidence is persuasive and stands unrebutted, adjust the award in accordance with that evidence." Id. The court thereby agreed with the contentions of several parties that the Tribunal could not properly "lock itself into its past judgments and thereby ignore new evidence that might show past decisions to have been infected with error." Id.

Accordingly, on matters of fact -- as contrasted with the legal standards or criteria for awarding royalties -- the Panel must base its determinations on the record presented in this case.^{6/} What the CRT said before, on issues of fact,

^{5/} The court also noted, however, that it would be "entirely appropriate for the Tribunal to employ, as one of its analytical factors, the determination whether circumstances have changed in the course of the ensuing twelve months, inasmuch as that conclusion will obviously be relevant to the question whether an award should differ from the prior year's award." 772 F.2d at 932.

^{6/} Indeed, there are indications that this is what the CRT itself did. In the 1983 decision, for instance, the CRT noted that it had previously relied heavily on Nielsen studies as one basis for its cable royalty determinations. It "reaffirm[ed] that conclusion" after "reviewing the evidence of the 1983 record." 51 Fed. Reg. at 12808. In other words,
(continued...)

cannot be binding. The Panel may surely find factual determinations from prior CRT decisions that are consonant with the record in this case -- and nothing precludes the Panel from relying on those prior fact findings as useful support for comparable fact findings made in this case. But where the record here contradicts prior factual rulings, or shows that the factual premises of the CRT's prior royalty allocations were in error, the Panel must be guided in its factual determinations by this record rather than what the CRT did on the basis of earlier (and quite possibly less complete) records.

B. The CRT's Question Whether to "Continue the Basis Upon Which It Has Made Its Distribution"

In its 1989 cable royalty distribution decision, the CRT posed a threshold question: "Should the Tribunal continue the basis upon which it has made its distribution, or should it adopt a new basis?" 57 Fed. Reg. at 15288 (Apr. 27, 1992). The second question raised by the Panel on December 11 (Tr. at 1122) related to the meaning of this comment.

PBS submits that the CRT's comment referred to the question of whether it should "adopt a new basis" for royalty allocations by abandoning the Nielsen studies, or significantly lessening the weight accorded them, in favor of

⁹(...continued)

the CRT's factual determination that Nielsen studies should be accorded significant weight in making royalty allocations was not a given and was not binding as a result of earlier CRT rulings; it was instead a new fact finding to be made on the basis of the record presented in the 1983 proceeding.

the Bortz survey or some other approach. In other words, this comment was not intended to signify that there was an open question whether the CRT should follow the legal criteria developed in the 1978 proceeding. Rather, the question was whether, in applying those legal criteria to the record evidence, the CRT should rely on different facts or factual bases than had been the case in prior royalty distributions.

The CRT's comment thus illustrates the dichotomy discussed above in Part A between the CRT's legal criteria and the factual application of those criteria to the record of a given proceeding. Accepting the CRT's legal framework as a given, in the 1989 case there remained a fundamental question as to how best to apply those criteria -- as a factual matter -- to the record evidence. This presented, among other things, a factual question of the extent to which the CRT would rely on the Nielsen studies as a basis for decision. That factual question was distinct from the binding legal standards that set the overall framework for the CRT's 1989 royalty awards.

C. The Rationale To Be Supplied by the Panel

The final topic raised by the Panel on December 11 (Tr. at 1122-24) relates to the question of how extensive a written rationale should be provided for the Panel's awards to different parties. The Panel noted that the reasoning of the 1989 decision is "extremely concise," and the question was raised whether "that is the sort of reasoning [the parties]

are looking for from this Panel or whether . . . something a little more elaborate is called for." (Tr. at 1124.)

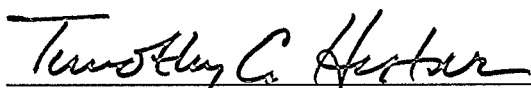
With so much money at stake, PBS respectfully submits that the Panel should undertake to provide a more extensive explication of its reasoning than is reflected in the 1989 decision. The statute provides that the Panel's decision "shall set forth the facts that the arbitration panel found relevant to its determination," 17 U.S.C. § 802(c), which reflects a statutory requirement of a reasoned explanation of the bases on which each award is made. Similarly, the House Report to the legislation establishing the CARPs observes that a "clear report setting forth the panel's reasoning and findings will greatly assist the Librarian of Congress." H.R. Rep. 103-286, 103d Cong., 1st Sess., at 13 (1993).

It is of course one thing to state the general hope for a more extensively reasoned written decision, and perhaps quite another to articulate just how extensive that reasoning must be. It does not appear possible to identify in advance any definite guidelines on this score; and it is also likely that the extent of the reasoning required for making awards to particular parties may turn on the complexity of the evidence presented. Some standards are suggested, however, by the decision in National Cable Television Association v. CRT, 689 F.2d 1077, 1091 (D.C. Cir. 1982): "We wish to emphasize that precisely because of the technical and discretionary nature of

the Tribunal's work, we must especially insist that it weigh all the relevant considerations and that it set out its conclusions in a form that permits us to determine whether it has exercised its responsibilities lawfully." Id. at 1319.

Similarly, in Christian Broadcasting Network, Inc. v. CRT, 720 F.2d 1295, 1319 (D.C. Cir. 1983), the court stressed "the need for improved clarity in the Tribunal's decisionmaking." After noting the CRT's statutory obligation to provide a statement of the reasons for its determinations, the court emphasized that the "Tribunal may not abdicate its responsibility. Nor may it attempt to distinguish apparently inconsistent awards with simple, undifferentiated allusions to a 10,000-page record." Id.

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